

DEPARTMENT OF THE INTERIOR  
OFFICE OF THE ASSISTANT SECRETARY-INDIAN AFFAIRS

RIGHTS-OF-WAY ON INDIAN LAND  
Proposed Rule - 25 CFR 169

Talking Stick Resort  
Scottsdale, Arizona  
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MODERATOR:  
ELIZABETH APPEL

(Original)

Prepared by:  
Sandra L. Munter  
Certified Reporter  
Certificate No. 50348  
CANYON STATE REPORTING  
2415 East Camelback Road  
Suite 700  
Phoenix, Arizona 85016

1 P R O C E E D I N G S

2 MS. APPEL: Good afternoon, everyone. We're  
3 going to get started, and maybe, Stan Webb may be joining us  
4 later.

5 My name is Liz Appel. I am the director of  
6 the Office of Regulatory Affairs, under the assistant  
7 secretary for Indian Affairs. With me I have Stephen  
8 Simpson, who's with our Office of the Solicitor, Division of  
9 Indian Affairs. And Stan Webb may be joining us later.  
10 He's with the Western Regional Office, he's a realty  
11 specialist there.

12 So you all should have received handouts. In  
13 your handouts, is a copy of the proposed rule that we're  
14 going to be discussing today and a little fact sheet on the  
15 proposed rule. And also is a copy of the presentation. So  
16 basically the plan is I'm going to run through the  
17 preparation to give an overview of the proposed rule on  
18 rights-of-way. And then we'll open it up for comments and  
19 questions. And this is tribal consultation, so if there are  
20 any tribal leaders, tribal representatives present, if you  
21 could, if they would speak first and if everyone would  
22 respect that, allowing them to speak first, then that would  
23 be best. So I will, as I said, first run through the  
24 presentation, and then we'll open it.

25 So we're here today to discuss a proposed  
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1 rule that was published in the Federal Register in June on  
2 addressing rights-of-way on Indian land. And this is part  
3 of a broader effort on behalf of the Department to improve  
4 the way the Department fulfills its trust management  
5 efforts. And these efforts started back in the early 2000s  
6 as part of a broader effort, but ultimately we focused on  
7 land management and updating the leasing regulations.

8 And in 2012, we updated those parts of the  
9 leasing regulations that addressed residential business and  
10 wind and solar leasing on Indian land. And by "Indian  
11 land," of course I mean land that is held, that the U.S.  
12 holds in trust or restricted status for Indian tribes or  
13 individual Indians.

14 So we held tribal consultations on both draft  
15 and proposed versions of the leasing regulations, and the  
16 regulations have evolved considerably during that time and  
17 they were finalized in December of 2012.

18 During those consultations and public  
19 meetings, we heard pretty often from people that  
20 rights-of-way should be the next, next focus for improving  
21 the land management regulations. So once we finalized the  
22 leasing regulations, we turned our attention to  
23 rights-of-way. And we had a work group of subject-matter  
24 experts to look at the rights-of-way regulations and draft  
25 some updates.

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1                   And we had had mostly realty officers from  
2 Bureau of Indian Affairs; Stephen Simpson, from the Office  
3 of the Solicitor; another, Jennifer Turner, from the Office  
4 of the Solicitor. And once that work group developed the  
5 draft, we distributed that draft throughout the Bureau of  
6 Indian Affairs, to all the realty officers. So this  
7 proposed rule really reflects the input of all of the bureau  
8 subject-matter experts.

9                   So the proposed rule, as I said, was  
10 published in June. And the current right-of-way  
11 regulations -- they are at Part 169, of course, of the  
12 proposed rule; they will also be at 169 -- but they were  
13 published back in 1968. And they were updated a few times,  
14 but there haven't been any updates since 1980.

15                  And the current, the current regulations  
16 really rely on specific statutory authorities that are  
17 different for each type of right-of-way, for railroads,  
18 telegraph lines, and back in even 1980, they may not have  
19 been considering the more advanced technology that we would  
20 want rights-of-way for now.

21                  So the proposed regulations try to simplify  
22 the approach by relying on the general statutory authority  
23 for granting rights-of-way, at 25 USC 323, which I think is  
24 the 1948 Act. So as far as our legal team has determined,  
25 there's no benefit lost by removing the specific statutory

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1 authorities.

2 But this is a proposed rule, and if anyone  
3 else identifies some specific benefit that will be lost by  
4 removing those specific statutory authorities, please  
5 comment on that.

6 Sorry, I'm not used to the desert air here.

7 Taking a step back, this is a proposed rule;  
8 this is not set in stone. We're here today because we want  
9 your comments. And we have a comment period open, so  
10 anything that I run through today, please, if you disagree,  
11 if you think that another approach is better, please let us  
12 know.

13 So, as I was saying, we had already been  
14 through the updates to the leasing revisions. Several of  
15 the policy approaches that we took in those leasing  
16 regulations, we've -- the work group has adapted to the  
17 rights-of-way and this proposed rule.

18 So, for example, the proposed rule  
19 establishes time lines for BIA to review requests for  
20 rights-of-way. It more clearly sets out the processes for  
21 BIA to review rights-of-way documents. It allows BIA to  
22 disapprove a right-of-way request, only in certain limited  
23 circumstances. And it defers to tribes on compensation, on  
24 the amount of compensation for tribal land.

25 So I'm going to try and really quickly run  
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1 through each of the subparts of the proposed rule.

2 The first, addressing the purpose,  
3 definitions. In an effort to make the rule more  
4 transparent, the proposed rule includes a lot of new  
5 definitions. It also sets out specifically what Part 169  
6 applies to and what happens if there's a life estate on the  
7 land.

8 Then some of the general provisions that are  
9 in the updated leasing regulations are also included in this  
10 proposed rule regarding when a right-of-way is needed,  
11 whether tribes can contract or compact the right-of-way  
12 functions, what laws and taxes apply, and how BIA provides  
13 notice of the rights-of-way and what decisions can be  
14 appealed and who qualifies as an interested party in those  
15 appeals.

16 So obtaining the right-of-way, the first  
17 pretty significant change the proposed rule makes to the  
18 process is removing the requirement for BIA to approve  
19 surveys on Indian land. So when a right-of-way applicant is  
20 preparing their application for the right-of-way, they need  
21 to survey, they no longer need to go to the two tiers of BIA  
22 review. They'll still need to get approval from the land  
23 owners to access the land and survey the land, but there  
24 will be no BIA approval required. So the only BIA approval  
25 will be part for the actual right-of-way.

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1           So the right-of-way application contents are  
2 set out in the proposed rule. And one of the new things is  
3 a bond or alternative security, rather than just a deposit,  
4 so we will talk about that.

5           The consent requirements, tribal consent is  
6 required for tribal land. And under the general statutory  
7 authority, consent of the owners of the majority interest in  
8 the land is required for individually owned land. And there  
9 are certain circumstances in which BIA can grant the  
10 right-of-way without consent under the statute, if the  
11 owners are so numerous that it would be impracticable to  
12 obtain the consent, that BIA can consent on behalf of them.

13           And the regulation tries to clarify when that  
14 would be appropriate by defining "so numerous" to mean 50 or  
15 more but less than 100 owners, where no owner or single  
16 owner holds an interest greater than 10 percent or where  
17 there are 100 or more co-owners. And those numbers, that  
18 definition comes from AIPRA, from the definition of highly  
19 fractionated land.

20           So the bond or alternative security can be a  
21 CD, an irrevocable letter of credit, treasury securities,  
22 security bond, and even an assigned savings account. And  
23 that bond has to cover the highest annual rent, the  
24 estimated damages from construction of permanent  
25 improvements in the right-of-way. If the land is in an

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1     irrigation project, it has to include operation of  
2     maintenance charges, and the bond must cover restoration and  
3     reclamation of the premises.

4                 There are certain circumstances in which BIA  
5     can waive the requirement for a bond or security. And where  
6     it's tribal land, BIA is going to defer to the tribe, if the  
7     tribe determines that a bond is not needed. For  
8     individually owned land, BIA can waive only if owners of the  
9     majority of the interest request and there's a best-interest  
10    determination.

11                For compensation, another significant change  
12    is that BIA is going to defer to the tribe on what the  
13    adequate compensation is. And the tribe may also waive the  
14    valuation for individually owned land. Market value is  
15    still required, unless BIA determines a waiver is in the  
16    landowners' best interest.

17                And valuation is also required, unless all  
18    the landowners waive or the grantee will construct  
19    infrastructure improvements that benefit the landowners.  
20    And, again, BIA makes the determination that it's in the  
21    landowners' best interest. And that provision also mirrors  
22    what is in the new leasing regulations.

23                Compensation, if it's a one-time payment, is  
24    due within ten days of the grant or whenever the grant  
25    specifies that it's due. Direct pay is available under the

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1 proposed rule only under limited circumstances where there  
2 are ten or fewer landowners and they all agree and their  
3 trust accounts are unencumbered, and that's real for  
4 administrative efficiency.

5           Reviews and adjustments, the proposed rule  
6 addresses whether there must be compensation reviews or  
7 adjustments.

8           There's Stan. Stan, feel free to come on up.

9           For tribal land, reviews and adjustments are  
10 not required, unless the tribe indicates that they would  
11 like for them to be required.

12           For individually owned land, they are not  
13 required under certain circumstances, for example, if the  
14 payment is in a lump sum, if the right-of-way duration is  
15 just for five years or less, if the grant provides for  
16 automatic judgments, or if BIA makes that best-interest  
17 determination.

18           So I mentioned that BIA is going to have time  
19 lines. When BIA receives an application package, BIA first  
20 is going to review it to make sure it's complete, and that  
21 means with all the supporting documents, including the  
22 environmental documents.

23           If it's incomplete, BIA will notify the  
24 applicant that it's incomplete. If it's complete, BIA will  
25 send a letter acknowledging the date of the receipt. And

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1 within 60 days, BIA must review and issue a decision on that  
2 right-of-way application.

3 So the date, the letter acknowledging the  
4 date of receipt is so that everybody knows what the start  
5 date is and, ultimately, when the due date is for BIA to  
6 make that decision. So the 60-day clock, I think I  
7 mentioned, begins only when the package is complete. So  
8 that includes any NEPA or valuation documents. And if BIA  
9 misses the deadline, then the parties can file a notice to  
10 compel action.

11 There are limited grounds for BIA to  
12 disapprove a right-of-way application. If the consents  
13 haven't been obtained or another requirement of the  
14 regulations hasn't been met or if there's some other  
15 compelling reason to withhold approval in the best interest  
16 of the landowners. But, overall, BIA is going to defer, as  
17 much as possible, to the landowners' determination that the  
18 right-of-way is in their best interest and may not  
19 unreasonably withhold approval.

20 BIA, the proposed rule clarifies that BIA has  
21 the discretion, where there are multiple tracts traversed by  
22 the right-of-way, BIA may grant one right-of-way for all of  
23 those tracts or issue separate grants for separate tracts or  
24 groups of tracts.

25 The right-of-way grant will incorporate any  
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1 restrictions or conditions that are in the consent, and  
2 there are certain conditions that the regulations set out  
3 that will also be included in the grant. And the grant will  
4 also incorporate maps of definite location.

5 So as far as a new use, this is what this  
6 slide is addressing, piggybacking. The proposed rule tries  
7 to clarify how BIA is going to approach piggybacking of  
8 rights-of-way. So if there's a new use within or  
9 overlapping an existing right-of-way, the proposed rule  
10 would require a new right-of-way if the original grant  
11 doesn't specify that new use or if the new use is not within  
12 the same scope of the use that the original grant specifies.

13 So, in other words, new right-of-way is not  
14 required and you may piggyback if the new use is within the  
15 same scope of use that the original, is specified in the  
16 original grant. So BIA will grant the new right-of-way if  
17 the new right-of-way does not interfere with the use or  
18 purpose of the existing right-of-way and the existing  
19 grantee consents.

20 So subpart C addresses the term and then  
21 renewals and amendment. The right-of-way term must be  
22 stated in the right-of-way grant, and BIA is going to defer  
23 to the tribe's determination as to what an appropriate term  
24 is.

25 For individually owned land, the term must be  
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1 reasonable depending on the use. And the proposed rule sets  
2 out some guidelines as to what may be appropriate terms for  
3 various types of rights-of-way.

4 And we're particularly interested in your  
5 comments on these, whether these terms are appropriate.

6 BIA will renew an original right-of-way, if  
7 the original allows for renewal and specifies what the  
8 compensation will be and the grantee attests that there's no  
9 change in the size, type, or location, so it's a true  
10 renewal. And, of course, if the landowners consent.

11 But the proposed rule would allow the  
12 original right-of-way to allow for renewal without landowner  
13 consent. And if there's a change, that there's going to be  
14 a change in the size, type, location, or duration of the  
15 right-of-way, then the grantee has to apply for a new  
16 right-of-way, rather than a renewal.

17 The proposed rule sets out the processes for  
18 amending or assigning or mortgaging a right-of-way and  
19 basically sets another timeline for BIA approval. The  
20 timeline in each of these instances is 30 days, rather than  
21 60 days for the original right-of-way. Again, the clock  
22 starts when BIA receives the complete package for review.

23 BIA approval of an amendment is required for  
24 any change to a right-of-way to accommodate a change in the  
25 location of a permanent improvement, if the change in

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1 location to previously unimproved land is within the  
2 right-of-way corridor. But if you're amending a  
3 right-of-way grant just to correct a legal description or  
4 make another technical correction, then a full amendment  
5 isn't required, an approval.

6 Landowner consent is required for amendments,  
7 and BIA may only disapprove under certain limited  
8 circumstances.

9 For assignment, BIA approval is required to  
10 assign any right-of-way, unless the original right-of-way  
11 allows assignments without approval, and the parties provide  
12 BIA with a copy of the assignments so the BIA knows at all  
13 times who the grantee is. And landowner consent is also  
14 required. And, again, there are limiting grounds on which  
15 BIA may disapprove an assignment.

16 BIA approval is required for mortgages, and  
17 landowner consent is required. And there are limited  
18 grounds for disapproval or mortgaging a right-of-way grant.

19 Right-of-way documents are effective as soon  
20 as BIA approves them, even if an appeal under the  
21 administrative appeal provision is filed. And BIA will  
22 record the right-of-way documents in the Land, Title, and  
23 Records Office immediately following approval.

24 If there is no BIA approval required, the  
25 grantee still has to provide BIA with a copy for recording.

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1 And the tribe has to record any grant for tribal utility  
2 that's not a separate legal entity, for example, or a grant  
3 on tribal land under a special act of congress that  
4 authorizes grants without BIA approval.

5 BIA may investigate compliance with the  
6 right-of-way and enter the premises to ensure compliance at  
7 any reasonable time, upon reasonable notice, and consistent  
8 with any notice requirements under tribal law and under the  
9 right-of-way documents, if the right-of-way documents impose  
10 restrictions. And BIA will promptly investigate if a  
11 landowner notifies BIA of a specific violation of the  
12 right-of-way.

13 Rights-of-way may include negotiated  
14 remedies. They would be included in the landowners' consent  
15 to the right-of-way grant and if the grant provides one or  
16 both parties with the power to terminate the right-of-way  
17 for tribal land or BIA approval. But for individually owned  
18 land, BIA has to approve. And these negotiated remedies may  
19 be in addition to or instead of the cancelation remedy that  
20 BIA already has.

21 The right-of-way grant can also provide that  
22 the tribe will address violations and have, held disputes  
23 will be resolved, whether in tribal court or in other forum.  
24 And BIA will generally defer to those.

25 So the proposed rule sets out the process if  
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1     there's a violation, basically sending -- BIA will send a  
2     notice of the violation and require the grantee to address  
3     it within ten business days. The same type of process  
4     occurs if there's a failure to pay rent or compensation.  
5     And if the grantee doesn't cure the violation or provide the  
6     payment by the deadline, then BIA is going to consult with  
7     the landowner.

8                     So if it's tribal land, BIA will consult with  
9     the tribe. If it's individually owned land, as much as  
10    feasible BIA will consult with the individual landowners.  
11    And in their consultation, they'll determine whether they  
12    should cancel the grant or use other remedies or give the  
13    grantee additional time to address the violation.

14                    So the proposed rule sets out the process for  
15    canceling the right-of-way and what the cancelation letter  
16    must say, when the cancelation is effective, and it also  
17    distinguishes abandonment from nonuse. So in the case of a  
18    grantee not using the right-of-way for a consecutive  
19    two-year period, for the use for which the right-of-way was  
20    granted, BIA may cancel the right-of-way within 30 days  
21    after mailing notice. And the same is true if the grantee  
22    abandons it, which is defined in the proposed rule as the  
23    grantee affirmatively relinquishing the right-of-way.

24                    Finally, the proposed rule clarifies that BIA  
25    approval is not required for service line agreements.

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1 Service lines are defined as utility lines running from a  
2 main line that's used only to supply the owners or occupants  
3 of the land with telephone, water, electricity, or other  
4 home-utility service.

5 And the current regulation includes a  
6 capacity limitation, but the proposed regulation does not.  
7 And while BIA approval is not required for service line  
8 agreements, the proposed rule does require that they, the  
9 agreement address mitigation of any damages that may occur  
10 during construction and restoration of the premises, and  
11 that the parties file the agreement in a plat with BIA  
12 within 30 days after signing so that BIA can put it in the  
13 LTRO and know that it's there.

14 Comments on the proposed rule are due  
15 August 18th. We've received several requests for an  
16 extension of that comment deadline, and those are under  
17 consideration. We hope to have a decision on that in the  
18 next couple days, by early next week at the latest. Email  
19 is the preferred way to submit comments, but there are  
20 other, you can also submit them by mail or through the  
21 federal regulations.gov website.

22 So once the comment period closes and we've  
23 collected all the comments we'll have, we'll reconvene a  
24 working group internally to go through all the comments.  
25 And all the comments that you make today will be transcribed

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1 by our court reporter here, and they will be included with  
2 the written comments that will be reviewed.

3 The work group will make any changes that are  
4 appropriate to the proposed rule and then publish a final  
5 rule in the Federal Register. And that final rule will then  
6 become effective 30 days, or no sooner than 30 days after  
7 publication.

8 So that is the quick-and-dirty overview of  
9 the proposed rule. Maybe not so quick. So what we're going  
10 to do now -- and Stan Webb has joined us. I don't know...

11 MR. WEBB: I don't have any comments. Liz  
12 had asked me to be available. And if there are any  
13 questions, maybe discuss what and how, what existing  
14 regional policy is or maybe help frame some of the  
15 questions, if necessary.

16 So I'm the regional realty office for BIA,  
17 the western regional office in downtown Phoenix. We've got  
18 jurisdiction over Arizona, Nevada, Utah, and a little bit of  
19 Southern California. I'm glad to be here, and I apologize  
20 for being late.

21 MS. APPEL: Okay. So what we'll do now is  
22 open up to you all for your comments and questions. And  
23 since we are having this transcribed today, I would ask that  
24 you come forward to the microphone and introduce yourself  
25 and your affiliation so that our court reporter can capture

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1 that, for the record.

2 MR. HARVIER: Good afternoon. Thank you. By  
3 way of introduction, my name is Martin Harvier. I'm the  
4 current vice president for the Salt River -- guess I'll turn  
5 this on here. Light's on, nobody's home.

6 MS. APPEL: There you go.

7 MR. HARVIER: Again, by way of introduction,  
8 my name is Martin Harvier. I'm the current vice president  
9 for the Salt River Pima-Maricopa Indian community. With  
10 that I'd like to welcome everyone here to our community and  
11 welcome you to our resort here and appreciate you selecting  
12 our resort to hold this very important  
13 government-to-governmental consultation that you're holding  
14 today.

15 This is the home of the Akimel O'Odham and  
16 the Xalychidom Piipaash, the Salt River Pima and the  
17 Maricopa tribe that reside here in our community. So again,  
18 we welcome you here. And, again, what I'm about to present  
19 today will also be submitted in writing, like you said,  
20 prior to the closing date on August the 18th.

21 I'd like to welcome any other tribal leaders  
22 that are here and others that are here this afternoon. The  
23 community believes that is long overdue, the revisions of  
24 the right-of-way regulations and appreciates the bureau's  
25 attempt to create consistency between the BIA leasing and

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1 the right-of-way process.

2 This assists our community members in  
3 understanding federal regulations. And while the community  
4 generally supports the draft regulations, the community has  
5 five key areas of concerns that we would like to raise here  
6 today.

7 With that, I would like to recognize staff  
8 because if there are any questions, I may have to turn to  
9 staff to answer some of these questions. But I'd just like  
10 to recognize our staff attorney, Nicole King, who is here;  
11 our design division manager, Mr. Harold Jones; and our  
12 right-of-way specialist, Leticia Dalton; and one of our  
13 assistant community managers, Mr. Kent Andrews, is also here  
14 with us today. I'd like to thank them for being here this  
15 afternoon.

16 Again, we do have some comments. Our first  
17 comment that we have is the increased administrative burden  
18 means additional cost and budget funding. The overall draft  
19 regulations increases the administrative responsibilities  
20 and burdens of the Bureau of Indian Affairs and  
21 self-government tribes who manage their own allotted and  
22 tribal trust lands by introducing new and time-consuming  
23 requirements, such as additional consent and recordation of  
24 simple agreements throughout the right-of-way process.

25 Additional process is particularly burdensome  
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1 with respect to allotted lands in the community. Is the  
2 Bureau of Indian Affairs ready to assume these additional  
3 burdens? Will there be additional administrative funding  
4 for tribes, such as our community, that is a self-governance  
5 tribe who manages their own trust lands?

6 The notice and consent requirements in the  
7 draft regulations are not feasible for right-of-way  
8 projects. I'd like to touch on the entry -- essentially the  
9 landowner notice and/or consent process mimic the federal  
10 leasing process with respect to entry onto allotted lands  
11 for primary purpose; example, survey, NEPA clearance,  
12 appraisals, consent to the application of right-of-ways, for  
13 right-of-ways, the renewal process, amendments, assignments,  
14 mortgages, and terminations, and good faith negotiations  
15 following terminations and cancellations.

16 Third point we would like to bring out is how  
17 does the Bureau of Indian Affairs envision this provision be  
18 carried out and exercised? How is mortgaging of  
19 right-of-ways an Indian landowner's best interest. Is there  
20 even a need for this type of mortgaging authority? This  
21 will only cause future issues. What mortgage documents and  
22 encumbrances will be required to be reviewed and approved by  
23 the Bureau of Indian Affairs, the Indian landowners, and  
24 affected tribal communities?

25 How would the Bureau of Indian Affairs  
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1 address right-of-way defaults, foreclosures, mortgage sales,  
2 and encumbrance violations, et cetera? Has the Bureau of  
3 Indian Affairs analyzed the impact of the Straight versus Al  
4 contractors in this issue?

5 The community strongly urges the Bureau of  
6 Indian Affairs to remove these mortgage provisions from the  
7 draft right-of-way regulations.

8 Number four, not all right-of-ways are  
9 commercial in nature. In fact, most right-of-ways in the  
10 community are governmental in nature to provide basic  
11 service, including utilities, to community members. In  
12 these draft regulations, there is a presumption that all  
13 right-of-ways are for profit transactions, however, many of  
14 the right-of-way applications in our community are actually  
15 tribal government projects to provide needed public  
16 infrastructure and to improve and to sustain the living  
17 conditions of our members.

18 Next point, the current process for the  
19 service line agreement works and should not be changed. As  
20 proposed in the draft regulations, the BIA is increasing  
21 costs, time, and delay in the service line process for  
22 electricity and other needed utilities. The community is  
23 concerned the proposed recordation requires the service line  
24 agreements provision will cause delay and frustrate  
25 providing basic service to Indian home owners.

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1           Service line agreements are meant to be  
2     simple agreements between the utility or governmental  
3     provider and the homeowner, who already has the approved  
4     homesite lease and to allow the service provider to cross  
5     the leased land to provide the basic utilities, as  
6     electricity, water, telecommunications.

7           In conclusion here, the right-of-ways are  
8     very important legal documents that provide both commercial  
9     opportunity and necessary governmental services to Indian  
10    landowners. Not all right-of-ways should be treated as  
11    commercial for-profit ventures. Governmental right-of-ways  
12    are necessary for tribal governments to provide basic  
13    service and utilities to their people.

14           With respect to two right-of-ways, a  
15    government's goal isn't to make money but instead to improve  
16    the lives of their elders, their families, and future  
17    generations. We ask that the Bureau of Indian Affairs look  
18    at the key issues that the community has raised today and  
19    revise these draft regulations to remove unnecessary  
20    administrative burdens and to also treat governmental  
21    right-of-way projects as what they are, the delivery of  
22    long-needed roads, sanitation, and utility services. And  
23    all of this is really to improve the life of our community  
24    members. Thank you.

25                   MS. APPEL: Thank you.  
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1                   MR. SIMPSON: I want to just say a couple of  
2 things there, one is that on the mortgages, just to be  
3 clear, they are actually, there apparently is a need. We  
4 have actually gotten requests for mortgages of  
5 rights-of-way, mostly up in the north, in the plains with  
6 oil and gas pipelines. So just to let you know that's why  
7 that provision is there.

8                   And this goes to both you and community and  
9 any other tribal government that if you have ways to or  
10 suggestions for how we could clarify or make the  
11 requirements for tribal utilities, for provision of tribal  
12 utilities better for tribal governments, please give us  
13 specific comments on that and how to do that. We would  
14 appreciate finding that out from you.

15                  MR. LEWIS: Good afternoon. My name is  
16 Stephen Lewis, and I'm the lieutenant governor from the Gila  
17 River Indian community. Again, I'd like to thank Vice  
18 President Harvier and the Salt River Pima-Maricopa County  
19 community for hosting this and also for the DOI's efforts in  
20 revisiting these long overdue right-of-way regulations. I  
21 will be just articulating some general comments, but the  
22 community will be submitting more detailed written comments  
23 by the deadline.

24                  So like many tribes, the community has  
25 historically had problems arising from the rights-of-way

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1 that cross the Gila River Indian Community, our reservation  
2 boundaries. In fact, as you know, in 2006 we filed a  
3 complaint in the D.C. federal district court against the  
4 United States for an accounting of all of our trust assets,  
5 trust funds, including the rights-of-way across the  
6 reservation.

7 The litigation is currently stayed pending  
8 settlement negotiations with the United States. And  
9 although we're not going to get into those here, we'll  
10 continue to hope to address our historic claims in federal  
11 litigation.

12 We're very interested, as well, in the  
13 department's efforts to improve rights-of-way process in the  
14 future. And we strongly support a more streamlined approach  
15 that takes into account how the federal rights-of-way  
16 approval process can affect economic development efforts on  
17 the reservation, and I echo the statements made by Vice  
18 President Javier.

19 At Gila River we have experienced firsthand  
20 how the rights-of-way process can be exceedingly lengthy.  
21 For instance, while we manage most of our rights-of-way, at  
22 the community ourselves and, you know, that includes the  
23 necessary environmental assessments, still we typically run  
24 into significant delays, once we submit the environmental  
25 assessments, the EAs, to the department for your approval.

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1                   And so such delays complicate, needlessly,  
2     the community's effort to construct much needed  
3     infrastructure on the reservation, for the benefit of our  
4     over 20,000 community members. So we support an amended  
5     process that clarifies the process for BIA reviews of  
6     rights-of-way documents, provides greater deference to  
7     tribes on compensation for rights-of-way -- and I saw that,  
8     that that's one of the proposed improvements as well -- and  
9     eliminates outdated requirements.

10                   We believe that a friendly and energetic  
11     administration and streamlined approach will help modernize  
12     the rights-of-way approval process in such a way that  
13     supports tribal self-determination and, importantly,  
14     improves the approval process to encourage economic  
15     development across our reservation.

16                   Again, we would like to thank you for the  
17     opportunity on behalf of the community, for myself, to  
18     provide comments. And, of course, we look forward to  
19     working with the Department of Interior in the future.  
20     Thank you.

21                   MS. APPEL: Thank you very much.

22                   Do we have any other tribal leaders who are  
23     present who would like to make a comment? Or other tribal  
24     representatives?

25                   MR. ALLAN: Good afternoon. My name is  
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1 Robert Allan. I'm the principal attorney of the Division of  
2 Natural Resources of the Navajo Nation, and we'd like to  
3 make some comments about your proposed amendments to the  
4 current right-of-way regulations, codified in 25 CFR Part  
5 160. We are also reserving our right to submit written  
6 comments as well.

7 I guess as a general matter, to begin with,  
8 these are, these proposed regulations are a significant  
9 improvement over what is currently promulgated in  
10 regulations we work with.

11 Beginning with proposed section 169.002,  
12 there are some definitions there, especially dealing with  
13 abandonment. We notice that the terms "abandonment,"  
14 "termination," and -- "abandonment," "termination," and  
15 there was another term. Well, anyway -- "relinquishment,"  
16 That's what it was.

17 The definition of "abandonment" uses the word  
18 "relinquishment," but to us there are three different  
19 transactions involving these terms. So we're recommending  
20 that you add -- you provide definitions for all three,  
21 "abandonment," "relinquishment," and "termination."

22 In your violation section of the  
23 right-of-way, when you police it up, you talk about all  
24 three forms of action that may be taken, but there's no  
25 definition for "termination" and "relinquishment."

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1                   What we've done in the past and in our tribal  
2                   litigation, our federal litigation or federal administrative  
3                   practice is we viewed abandonment as nonuse and intent not  
4                   to develop or failure to develop within the two-year period.  
5                   Relinquishment is a voluntary act which has to be recorded  
6                   and then the termination occurs then.

7                   Termination, seems like that would be an  
8                   adjudication where the investigation is done for violation  
9                   of the terms of right-of-way. And if there's a violation  
10                  and it's not, there's no progress made towards reinstating  
11                  the grant right-of-way, then seems like termination would be  
12                  appropriate. So I think that would help, that provides  
13                  clarity.

14                  This federal power act project, we were  
15                  wondering if that was meant to include the scope of  
16                  commercial transmission power lines, or are we just going to  
17                  confine that to federal power projects?

18                  MR. SIMPSON: Excuse me for interrupting but  
19                  I just wanted to clarify that one.

20                  That is the existing regulations as well.  
21                  And while I'm not a FIRC attorney by any means, my  
22                  understanding, from our water people, is that that's what it  
23                  is for, it is for hydro power projects.

24                  MR. ALLAN: Hydro power.

25                  MR. SIMPSON: And that's what it's used for.  
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1 Federal Inter Regulatory Commission does not regulate  
2 transmission lines, I don't think. But that's what it's  
3 intended for, is generally used for hydro power projects, is  
4 my understanding.

5 MR. ALLAN: Thank you.

6 Compensation, that term, the way it's  
7 defined, means "something bargained for." So we were  
8 thinking, well, perhaps that word "something" might, might  
9 be better clarified by the statement "goods, services,  
10 money, or a combination of all of these forms of  
11 compensation."

12 And trespass, the Navajo Nation, we have a  
13 trespass statute. And although this is a reasonable  
14 definition and it's workable, we were wondering if, perhaps,  
15 you might want to amend it to include causing things to  
16 happen in your right-of-way, for example, pollution, or  
17 there's a mining operation adjacent to the right-of-way and,  
18 like uranium, or spills over onto the right-of-way, who's  
19 going to clean that up? Are we going to hold the  
20 right-of-way grantee responsible or mining company, mining  
21 lessee.

22 Moving on, Section 169.004, I like, I  
23 generally like that, but some questions have come up. What  
24 does it really mean when you say a person or legal entity,  
25 including an independent legal entity owned and operated by

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1 a tribe or federal state or local government, who is not an  
2 owner of the Indian land?

3 As you probably know, the Navajo Nation, we  
4 have several enterprises, and we have a utility company,  
5 utility authority. We also have energy development  
6 enterprises. We have an oil and gas enterprise. And was  
7 this meant to require them to now get grants of  
8 right-of-way, or would this be a unilateral grant by the  
9 Nation?

10 What you have is provisions for consent by an  
11 Indian tribe, but there doesn't need to be consent or a  
12 transaction for a grant of right-of-way under these  
13 regulations. It appears if you fall within that definition,  
14 who is not an Indian owner, a person or legal entity is not  
15 an Indian owner, does that mean -- we're kind of confused  
16 when it comes on our enterprises and business entity. Do  
17 they need to get rights-of-way through the federal system,  
18 or do we just grant them from the Nation to the tribal  
19 government?

20 The other is the exception "unless you are  
21 authorized by a" -- I guess that's "land use agreement, not  
22 subject to this part or lease." I think I -- we've had this  
23 problem in the past, and this is related to  
24 telecommunications and power transmission lines that were  
25 constructed without a grant of an easement. They were

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1 existing, I think, around the time of the statute, the  
2 general 25 USC statutes were approved for the granting  
3 rights-of-way on Indian lands.

4 So how do we make those legal? Are they  
5 legal now, or are they trespass? We can bring them within  
6 the scope of an agreement to make, to legalize the past use.  
7 And then "or lease." Does that mean they'll automatically  
8 get a grant of an easement for egress -- ingress/egress with  
9 a lease, or is that separate? We have transactions where we  
10 do both. So we're wondering, we think there needs to be a  
11 little bit of clarification on that point.

12 And then as-built rights-of-way, especially  
13 for Public Law 93.121 water projects, public water projects.  
14 We have an agreement for those, plus we have a special  
15 statute. And we were wondering if they would be impacted.  
16 And then we also use as-built rights-of-way to correct title  
17 problems, perhaps trespasses, unauthorized uses that have a  
18 long history. And I'll make this, I'll just touch the  
19 larger points of this.

20 Looking at 161.008, there are discussions  
21 that involve text, allows for the incorporation of state  
22 law. We feel that this is a waiver of sovereign immunity,  
23 both for the Indian tribe and the federal government. We  
24 think that this needs to be eliminated or very much limited.

25 That same issue comes up in highway  
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1 rights-of-way when you start talking about applying state  
2 law on the highway right-of-way, Al versus Straight. We  
3 have problems with the state of New Mexico and their  
4 discussion on rights-of-way perpetuity. There needs to be a  
5 residuary clause reform so that we don't run into the  
6 problem when there's an equivalent of a deed-out of the  
7 title to the property. Then the State will say well, we  
8 can't build any highways unless we have this right-of-way  
9 perpetuity and we want everyone to abide by the state law  
10 and that's the only way we can build this. If you don't  
11 agree to it, we'll move the money to build the highway to  
12 elsewhere in the state.

13 We've gone back and forth with the State on  
14 that issue. And those are points I think that need to be  
15 addressed. They are real. Right now we've had, we had some  
16 cases, but we didn't get any adverse results where we lost  
17 land or sovereignty on car accidents.

18 At 169.123, grant of right-of-way required  
19 for new use within our overlapping and existing  
20 right-of-way. We've had some problems recently with this.  
21 I know that some of the regional offices in the Bureau of  
22 Indian Affairs, they take the view that there can be a grant  
23 of right-of-way over existing right-of-way.

24 We're wondering if that's what you intend to  
25 do with this proposed rule in the text here. And what

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1 happens in the event there's an adverse grant of  
2 right-of-way approved by the Nation but the grantees have  
3 not consented to its use to, to its possession of the  
4 right-of-way and now there's going to be a new use that may  
5 interfere with their grant of right-of-way? Example is  
6 running fiberoptic telephone lines inside highway  
7 right-of-way.

8 We have part of the Bureau of Indian Affairs  
9 saying that different federal statute, the Highway Safety  
10 Act, may, the way they were reading it, their engineers read  
11 it as it limits tribal sovereign immunity. Congress didn't  
12 intend that. And they are saying well, we can grant a  
13 unilateral right-of-way outside of the provisions of what we  
14 have so far, if we want to. But we have been able to come  
15 to agreement on those issues and avoid all kinds of  
16 litigation plus confusion over who has the right to use  
17 property and who owns the improvement inside the property.

18 Taxes. We think that all the taxes,  
19 possessory interest, business activity, et cetera, those  
20 proceeds should go to the tribe exclusively. Of course  
21 there's all kinds of case law. But the way you have drafted  
22 your regulations, the text supports tribes and tribal  
23 sovereignty, which we agree with and support.

24 Valuation of compensation and the value of  
25 the easement. We are very happy that you've allowed for

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1 tribes to determine what they think is appropriate  
2 compensation, which helps the Navajo Nation. I mean, we  
3 like that. But the problem comes in when we begin to rely  
4 on our market analysis, we try to tie that with appraisals  
5 or other appropriate valuation method with USPAP.

6 An example is well, when there's a real  
7 estate appraisal, they decide when the value is, and there's  
8 generally these three different factors. And we look at the  
9 economic value to the Nation to determine what we think is  
10 fair compensation, and it's much different than what an  
11 appraiser would say the fair market rental would be or the  
12 fair market value of the premises.

13 And, for example, a commercial right-of-way,  
14 a rock could be valued at several hundreds of dollars or  
15 thousands of dollars, but if you bring in a real estate  
16 appraisal, they'll say oh, that's just \$40. And that  
17 generally doesn't help the Nation or the Indians or tribal  
18 sovereignty or governance by the United States of these  
19 lands.

20 I think that pretty much is our major  
21 concerns. We will submit written comments. Thank you.

22 MS. APPEL: Great. Thank you. We appreciate  
23 the specificity, too. It's very helpful.

24 All right. Do we have any other tribal  
25 representatives?

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1 MS. ABEITA: Good afternoon. I'm Carolyn  
2 Abeita, and I'm general counsel for the Pueblo de San  
3 Ildefonso, New Mexico, and I want to thank everyone for the  
4 opportunity to present some comments. The Pueblo will also  
5 be submitting written comments, as well, but the Pueblo  
6 feels that it's important to participate in this  
7 consultation, and so we appreciate the opportunity.

8 Generally, the Pueblo agrees that the  
9 right-of-way regulations need to be streamlined and support  
10 tribal self-determination, self-governance. And it's  
11 important that the BIA support and expand its deference to  
12 the tribes' decisions regarding rights-of-way over their  
13 land, and the proposed revisions are a step in that  
14 direction, so we appreciate that.

15 We do have a little bit of a concern about  
16 the consultation process and that we understand that the  
17 Bureau had a working group and you involved BIA realty  
18 offices in the development of this. It would have been good  
19 to also include the tribes earlier on, rather than just  
20 after getting consultation during the public comment period.  
21 Although, you know, we do appreciate the opportunity to  
22 provide this input.

23 Specifically, we, the Pueblo agrees that the  
24 regulations have to provide clear and greater deference to  
25 tribal decisions on how the tribe choses to value its land

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1 and what type of compensation it negotiates for its  
2 right-of-way.

3 Section 169.109 is important to San  
4 Ildefonso. We support the language where BIA will defer to  
5 the tribe and not require market valuation if the tribe  
6 submits a tribal authorization to waive valuation. This  
7 allows the tribe to negotiate any payment amount, including  
8 other types of compensation that it feels is in the best  
9 interest of the tribe.

10 We've been involved in situations where third  
11 parties feel that the BIA must require tribes to comply with  
12 a standard type of appraisal and evaluations, meaning tribes  
13 should just get fair market value based on an appraisal and  
14 that is it.

15 We have been involved in a utility  
16 right-of-way case in New Mexico where the tribe and utility  
17 company negotiated for rights-of-way over its lands, and  
18 then the utility company went to the state regulatory  
19 commission to, for a rate increase, to recoup the cost of  
20 having to pay out for the right-of-way over tribal lands.

21 As a result, the tribe, the cost of  
22 right-of-way is being passed on to utility customers. So  
23 when we say "third parties," those customers are the ones  
24 saying well, our utilities rates are going up because the  
25 tribes are charging so much for their rights-of-way.

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1           Now, never mind that when, 50 years ago, the  
2     tribe had a right-of-way that was \$10,000 for 50 years and  
3     these costs were passed on, nobody had a problem. But now  
4     this is becoming a very big concern and is now being  
5     elevated by these third parties, who are not a party to the  
6     underlying right-of-way agreement between the utility and  
7     the tribe. And it is clearly within the tribes' sovereign  
8     authority to be able to negotiate and value what it feels is  
9     proper for the access to over its lands.

10           Now, when you have the third parties, they  
11    are saying no, that is, that's not right and they are  
12    pushing that really tribes are limited to either fair market  
13    value or the appraised market price for that. So the Pueblo  
14    is very supportive of the language in Section 109.

15           We also support the language that allows the  
16    tribes to request BIA assistance to determine the value but  
17    then defer again to the tribes' decision as to whether they  
18    will use that valuation in their negotiation.

19           San Ildefonso also supports the language of  
20    Section 169.11A, and this allows -- where the BIA will use  
21    different valuation methods when requested by a tribe.  
22    Again, this is where we've had situations where third  
23    parties complain that BIA needs to require the Pueblo, in  
24    this instance, to accept a BIA appraisal and nothing more.

25           In fact, there are people at the state  
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1 regulatory level that feel that if San Ildefonso did not  
2 request an appraisal or did not use an appraisal that  
3 somehow that made that right-of-way defective because they  
4 don't understand the process and the deference that needs to  
5 be given to a tribe as to how it deems to value its land.  
6 So there's a lot of misconceptions out there, and so this  
7 language helps tribes and it supports that tribal  
8 self-governance over their land.

9 We also support the language in Section  
10 169.115 that allows for non-monetary or other types of  
11 compensation. We like the opportunity to negotiate for  
12 items, such as technical assistance on projects,  
13 construction of other infrastructure, increased access to  
14 utilities for tribal members, and so forth, depending on  
15 what the parties seeking the right-of-way may have to offer  
16 as in-kind compensation. And so this is an opportunity for  
17 the tribes to develop a deal that is more beneficial, based  
18 on their needs.

19 We're also happy to see that BIA would  
20 consider the valuation alternative based on through-put or  
21 percentage of income. This gives tribes more tools to  
22 negotiate what is best for their situation.

23 So, generally, we're supportive of this  
24 language regarding compensation and the ability for the  
25 tribes to do what they, or negotiate what they feel is best

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1 for them.

2 The Pueblo has some specific concerns  
3 regarding some of the items in the proposed regulation. And  
4 first is the definition of service line. And you have that  
5 so that it's a utility line running from a main line that is  
6 used only for supplying owners or authorized occupants or  
7 users of land with telephone, water, electricity, gas, or  
8 internet service or other home utility service. We would  
9 suggest that you clarify that you add that this is tribal  
10 land. That makes it consistent with the last section, which  
11 does talk about tribal land.

12 Again, referring back to the situation with  
13 the utility, a lot of these third party, there's a large  
14 population of non-Indian fee landowners within the exterior  
15 boundaries, and so they were pushing to say that well, the  
16 service line agreements should apply to them as well. And  
17 so it needs to be very clear that this is over tribal land  
18 and typically for tribal users.

19 We also have a concern about the definition  
20 that says running from a main line. Again, we have a  
21 situation in New Mexico where a utility company has said  
22 that the distribution line that runs off a transmission line  
23 and runs onto the reservation and then branches off into  
24 specific lines to houses and tribal offices, those smaller  
25 branching lines are typically what would be subject to a

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1 service line agreement. But the utility company is making  
2 the decision to say that that distribution line is also part  
3 of the service line agreement and they should not be  
4 required to pay for right-of-way.

5 So we would like to have something in the  
6 regulation that would address situations where a utility  
7 company would try to classify everything as a service line.

8 MR. SIMPSON: We've heard some of that from  
9 transmission companies as well, that what they call a  
10 service line -- or what we call a line is what they call a  
11 service drop. And so we've asked for them, then, to try and  
12 help us clarify because what we're thinking is a service  
13 lines is exactly what you're thinking is a service line.

14 MS. ABEITA: Right, and --

15 MR. SIMPSON: So, yeah, if you can help us  
16 clarify that, make that distinction absolutely clear because  
17 we agree that that's, that those lines coming in from the  
18 main line should have that.

19 MS. ABEITA: Right. And then the other issue  
20 with that is that if there is a distribution line and then  
21 it branches off into service line agreements to, say, the  
22 tribal facilities or to tribal residences and then a  
23 non-Indian then hooks onto that service line to service  
24 their fee property, what is that. And so that there's a  
25 discussion about well, that should be a service line because

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1     it's coming off of a service line, even though it's over  
2     tribal land.

3                     So you can see where, who is defining what is  
4     a service line is important. And if it's the utility  
5     company that's defining that, then that is really going to  
6     be to the detriment of the tribes. So we would like that to  
7     be considered.

8                     We agree that BIA must have time lines for  
9     decisions on our right-of-way submission, and we agree,  
10    generally, with the time lines set out in Section 304. But  
11    the Pueblo has had right-of-way agreements lingering in BIA  
12    for years, in some instances. And these are, the delay is  
13    primarily at the front end, while we're waiting to find out  
14    if a packet is complete.

15                    And so, you know, are these surveys, are  
16    these initial surveys sufficient on those types of things?  
17    And so for that reason, we ask that there be more definite  
18    time frames for the BIA to notify the tribe as to when the  
19    application, as to whether their application is complete  
20    and, because it's not until you get that receipt letter that  
21    the 60 days run. But, again, conceivably, you could still  
22    have something, a packet sitting in BIA at the agency office  
23    or even at the regional level for months, for a year, until  
24    somebody gets to that packet.

25                    And I agree that these are, you know, there  
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1 are some needed resources. And a lot of this delay is  
2 because of the lack of resources in the realty divisions and  
3 departments at BIA. You know, we've got one guy who's  
4 looking at all the surveys for the regional office in  
5 Albuquerque. So, and then, so we agree with the comments  
6 that some of these administrative burdens will increase  
7 that. And then you add the time line, so you're really  
8 increasing the burden on the BIA to meet these. And so we  
9 have a real concern about the lack of resources.

10 Similarly, for those tribes that are  
11 compacted or even 638-ing some of these activities. So  
12 that's a real concern. And because of that lack of a  
13 timeline at the beginning, some of the other time lines  
14 become almost meaningless because if you can get past that  
15 first one, then you're almost golden. So that's an issue  
16 there.

17 We'd also like to point out that as far as  
18 time lines and the appeal process, under Section 304, at the  
19 end, the burden is really upon the parties to hold the  
20 Bureau's feet to the fire so that if the Bureau is not  
21 meeting these time lines, the party, a party may file a  
22 written notice to compel.

23 So, again, you have your 15 days, but if the  
24 tribe doesn't get to this for 30, 45 days, that's still, you  
25 know, you've still put the burden on the tribes to really

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1 monitor and push, so that's going to still be a problem.

2 The other thing we would like to point out is  
3 in, at the last step of the process. If the regional, or  
4 the BIA director does not issue a decision within 15 days,  
5 the parties may file an appeal from their inaction. So  
6 you're again, you're requiring the tribe to file an appeal,  
7 and what are they appealing? The fact that the director  
8 didn't make a decision?

9 So that seems like there should be, possibly,  
10 consideration that if at that level the director has not  
11 made a decision, that it is deemed approved. That may be a  
12 consideration at that level. After you go through all of  
13 that process, if the director does not make a decision  
14 within, whatever, 15 days, that it be deemed approved, much  
15 like some of these other submissions, say, for a compact or  
16 something like that.

17 Again, if it does have to be appealed to  
18 IBIA, will the IBIA be making a decision as to whether to  
19 grant or deny the right-of-way, or would they just be  
20 issuing a decision to compel the director to make a decision  
21 that he hasn't made already? So that's an issue there.

22 We also, in following along the line of an  
23 appeal, looking at section one -- 169.011, the only parties  
24 that can appeal a denial are the Indian landowner. And then  
25 there is another provision in here that talks about an

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1 interested party.

2 And so while the first two sections seem to  
3 limit who has the right to appeal, the last provision under  
4 B talks about an interested party who is defined as any  
5 person whose own direct economic interest is adversely  
6 affected by an action or decision. And so I don't know who  
7 that would be, if the landowner is the only entity that can  
8 appeal a decision. So I don't know why that is in there.

9 And that would also give rise to someone  
10 saying, for example, those affected utility customers, they  
11 would say well, I have a direct economic interest and it's  
12 adversely affected.

13 So I understand that, you know, that that's  
14 not what the intent is, but what we've gone through, what  
15 we've been dealing with in New Mexico, we've got folks that  
16 are lay folks, we've got people that are looking at all of  
17 these regs, and they will be submitting comments. They have  
18 been encouraged to submit comments on this. So we just want  
19 to point that out.

20 And then, lastly, the Pueblo de San Ildefonso  
21 supports the language of 169.009 that affirmatively states  
22 that improvements, activities, possessory interest within  
23 the tribal right-of-way may be taxed by the tribe but may  
24 not be taxed or assessed by the State, as a result of the  
25 federal laws.

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1           We think it's important that the regulation  
2   reaffirm that the tribes still have this authority over the  
3   right-of-way, over their land, and that the grant of the  
4   right-of-way does not diminish that sovereign authority, and  
5   that is a vast improvement.

6           The Pueblo also supports the language in  
7   169.008 that a grant of right-of-way by the BIA does not  
8   diminish tribes' jurisdiction, taxation enforcement, civil  
9   authority. So we appreciate the fact that there is vast  
10   improvements, and we appreciate the fact that the intent is  
11   really to defer and give greater deference to the tribes'  
12   rights and sovereign authority over their lands. And we  
13   look forward to improving on some of these. And we hope to  
14   submit some additional, more detailed comments. So thank  
15   you for the opportunity.

16           MS. APPEL: Thank you.

17           MR. SIMPSON: Yeah, only one follow-up thing  
18   on that, and it's -- I'm not asking a question, so you don't  
19   need to come back up but... We've had, now, a couple of  
20   comments on the legal jurisdiction provision, at least  
21   that's what I refer to it as, the one that talks about  
22   retention of sovereign rights and sovereignty over land such  
23   as rights-of-way. And I want to ask for specific comments  
24   on that portion.

25           The intent of that provision is to assert, as  
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1 a grant from the secretary, the secretary asserting the  
2 rights of the sovereign tribes over their land to the  
3 greatest extent possible, while remaining inside the Supreme  
4 Court's decisions in Montana and Straight, because of course  
5 we can't overrule the Supreme Court.

6 And so I would especially appreciate tribal  
7 lawyers', industry lawyers' thoughts on whether we've  
8 managed to pull that off and any sort of, exactly how that  
9 should work, how it should be clarified, if it needs to be  
10 and that sort of thing because it's sort of our first  
11 attempt at it, and we'd like your thoughts on that.

12 MS. APPEL: Do we have any other tribal  
13 representatives who would like to speak?

14 Come on up.

15 MS. LUCEI: I'm not a tribal representative,  
16 I'm staff, so is that all right?

17 MS. APPEL: Yeah.

18 MS. LUCEI: Okay. My name is Karen Lucei. I  
19 work for Yakama Nation Trust Real Estate Services. And we  
20 have staff that wish they could have been here, but because  
21 of the distance, our land enterprise, our wildlife people,  
22 they couldn't attend this session. And I think it's  
23 important to attend such a consultation hearing. The notice  
24 wasn't in advance enough to where our elected officials  
25 could be present. We have a lot of issues going on in

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1 Yakama that they just couldn't be here at this time, and I  
2 wish they could have been here.

3 So the short time that I and the right-of-way  
4 attorney were able to discuss, which was maybe five minutes,  
5 we put together a short list that is only for discussion,  
6 it's not our comments. Our formal comments will be  
7 submitted but... I won't go over all of them. I have a list  
8 of six, I'll go through maybe three of them.

9 Under proposed 169.111, there is a reference  
10 to using a market analysis appraisal or other appropriate  
11 valuation method of determining the market value of  
12 permanent homelands that will be converted to a right-of-way  
13 use. It is time to recognize the premium value that should  
14 be applied to permanent homelands.

15 Permanent homelands are unlike any other  
16 lands and should be valued as such. We have quite a few  
17 rights-of-way that were granted by the Bureau of Indian  
18 Affairs under perpetual that probably should have never been  
19 granted because those areas are within the closed areas of  
20 our reservation that are supposedly for the exclusive use  
21 and benefit of the Yakima Nation. So it's kind of late to  
22 do anything about that.

23 The specific use language of current 169.05  
24 has been omitted from the proposed regulations. That  
25 language was added to the regulations in 1980 to prevent

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1 piggybacking of utilities and should be continued.

2 Now, I wasn't on the staff in '72, '73, or  
3 1980, so I don't know what was said at those sessions or  
4 those hearings or during the regulation revisions, but I  
5 think it's good to remember what was said.

6 The partial disallowance of piggy-backing  
7 without BIA approval under proposed 169.123 would be a good  
8 first step, but the practice of piggy-backing should be  
9 disallowed completely, regardless whether it is allowed by  
10 state law.

11 The proposed 169.07 changes the consent  
12 requirements of 25 USC 324 by authorizing a form of  
13 administrative condemnation contrary to prior federal  
14 circuit court decisions that prohibited the re-delegation of  
15 interior authority, example SP Transportation Company versus  
16 Y (phonetic), 700 FTD 550 Ninth Circuit 1983, and the  
17 administrative condemnation of tribal lands, USB 10.69 acres  
18 of land, more or less, in Yakima County.

19 And we rely on a tribal coalition for  
20 generating support for issues that affect our tribes. And  
21 the timing of the comments due will not allow for us to  
22 meet. Our tribal officials come together, Atee (phonetic)  
23 and I, I believe, will be meeting in September, which after  
24 the comment deadline is. So that's kind of detrimental to  
25 tribes, the timing of the deadline of comments.

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1 Thank you.

2 MS. APPEL: Thank you. And as I mentioned  
3 before, we have other requests to extend the deadline, so  
4 hopefully we'll hear on that soon.

5 MS. LUCEI: Right. And I agree with the  
6 comment that was made that I wish tribal officials and staff  
7 had been included during the writing of this regulation to  
8 show a cooperation, because my realty officer and I, as a  
9 right-of-way staff, were never contacted about these  
10 regulations and we're a contracted program.

11 MS. APPEL: Thank you.

12 Do we have any other tribal...

13 MS. LAWSON: Is it all right if I take the  
14 microphone off, so I can lean?

15 MS. APPEL: Yes.

16 MS. LAWSON: So my name is Sarah Lawson. I'm  
17 with Muckleshoot Indian Tribe in Auburn, Washington. I'm  
18 the trust real estate director for the tribe. The comments  
19 that I'm giving today are not necessarily the tribe's  
20 comments, but the tribe will publically submit comments  
21 later.

22 My first question is under the new or under  
23 the proposed regs, there will be no mortgages without  
24 consent and no assignments or piggy-backing without consent.  
25 We've actually had Puget Sound Energy mortgage all of the

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1 rights-of-ways that they have on Muckleshoot Indian  
2 reservation without consent. They let that slip to me one  
3 day, and I was like really guys? You don't have permission  
4 to do that.

5 So my question is, what are my remedies? I  
6 don't see any remedies in the rights-of-way regs, if those  
7 things are done without consent, if there's piggy-backing  
8 without consent or if there's mortgages without consent.

9 Section 169.009, taxation. It says, let's  
10 see, subject only to applicable federal law. Have we  
11 thought at all about what those other applicable federal  
12 laws might be? We have Comcast operating on the  
13 reservation, and they have telecom laws. We have Puget  
14 Sound Energy and Bonneville Power Association -- or I'm  
15 sorry, Administration.

16 MR. SIMPSON: Let me respond to that one  
17 because this language is taken directly verbatim from the  
18 leasing regulations, and we went through that with those  
19 and, in fact, I've been quoted in some litigation on that  
20 point, during consultation on those regs.

21 The subject to applicable federal law here is  
22 a reference to the White Mountain v. Bracker balancing test.  
23 If I remember right, Bracker is spelled B-r-a-c-k-e-r.

24 The Supreme Court set up a balancing test for  
25 whether state taxes could be applied to Indian land, and it

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1 balances the federal interests, the state interests, and the  
2 tribe's interest in those taxes. And what I've said in the  
3 leasing regs and it's been quoted and I might as well say it  
4 again is that this provision is putting the federal thumb  
5 down on that balance.

6 Typically those, that litigation only  
7 involves tribes and, or lessees and the state, and the  
8 federal government isn't often in those cases. And so the,  
9 so what we're doing here is we're expressing the strong  
10 federal interest in opposition to state taxes.

11 Because the Supreme Court set up a balancing  
12 test, we cannot actually prohibit them by regulation. But  
13 that's what that subject to federal law means, is it means  
14 that those taxes are subject to that balancing test, and we  
15 are generally very against such taxation.

16 MS. LAWSON: Okay. Thank you for the  
17 clarification.

18 MR. SIMPSON: You're welcome.

19 MS. LAWSON: You said you want more -- what's  
20 the word I'm looking for -- similarity with the BIA leasing  
21 rights, but there's a couple of things that are different in  
22 the rights-of-way regs. And I'm all for having them be very  
23 similar because I think it's helpful for BIA staff.

24 But surveys. So in the leasing regs, you  
25 don't have to get permission to survey. But in the

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1 rights-of-way regs, you do have to get permission to survey.  
2 Personally, I am not in favor of having to get permission to  
3 survey because I don't believe we need to get permission in  
4 this day and age of GIS and GPS and everything can be done,  
5 basically, using satellites. But you might want to fix that  
6 difference between the two.

7 And then the rights-of-way regs say that once  
8 an application is received, BIA staff shall, quote-unquote,  
9 promptly notify the applicant. But in the leasing regs  
10 there's a ten-day deadline for them to notify that the  
11 application has been received, and it would be nice to have  
12 the same deadline apply for rights-of-way regs, or for the  
13 rights-of-way regs.

14 169.121, which sort of deals with the -- if I  
15 can find it -- what provisions the grant of right-of-way  
16 must contain, part three of that includes some provisions  
17 that are either exactly identical or substantially similar  
18 to the current rights-of-way regs.

19 We have a lot of trouble getting utility  
20 companies to agree to those provisions. And the way we've  
21 gotten around that at Muckleshoot is that the right-of-way  
22 is first given to the tribe and then the tribe, when they  
23 assign a portion or assign a certain use to the utility,  
24 holds back those provisions. So if we are assigning it to  
25 City of Enumclaw for gas services, City of Enumclaw is not

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1 required to restore the right-of-way in a workmanlike manner  
2 or keep clear. Those obligations are still on the tribe.

3 And we also want to clarify whether tribes  
4 can hold third parties back from those provisions or if they  
5 have to be given over because you're not going to get  
6 utility companies -- I mean, we've had the Puget Sound  
7 Energy, City of Enumclaw for gas service, and I think one  
8 other, I can't remember off the top of my head, all  
9 expressly object to those provisions.

10 169.107, the consent requirements, my  
11 personal opinion on this is that this is going to allow  
12 steamrolling by utility companies over allotments,  
13 individual trust land allotments that have 50 to 100  
14 co-owners.

15 At Muckleshoot we have an expired Bonneville  
16 Power easement that goes through a trust allotment. We have  
17 been in negotiations with Bonneville Power since 2007 in  
18 order to get a new unexpired easement in place. This  
19 provision would allow Bonneville Power to essentially  
20 steamroll all the negotiations that we've conducted over the  
21 last seven years between the landowners and Bonneville Power  
22 and have the easement granted at a fair market value over  
23 the landowners' objections.

24 I also think your statement earlier in saying  
25 that it was language that was derived directly from AIPRA,

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1 it may not be a good idea to use the language from AIPRA  
2 because if it's from AIPRA, it was probably designed to  
3 reduce fractionation. And I don't know if we can -- I mean,  
4 we're not going to be reducing fractionation, so maybe we  
5 need to find some sort of other thing.

6 One item or one additional I thought of that  
7 we could possibly use there would be to say if owners are  
8 too numerous or use some sort of whereabouts unknown status  
9 because we have, the property that has Bonneville Power on  
10 it has 97 co-owners, but they are all there. We can find  
11 them. Lots of them are on council.

12 So if it was maybe an owners too numerous  
13 situation I could understand -- I mean, I'm sorry, not  
14 owners too numerous. If it was a whereabouts unknown  
15 situation, I could understand approving without consent.  
16 But when the owners are there and have been actively  
17 involved in the negotiation, you shouldn't be able to go  
18 over their head like that.

19 MR. SIMPSON: We would appreciate you  
20 thinking some about that. This provision is statutory. The  
21 power bureau to grant consent on a right-of-way where the  
22 owners are too numerous to contact is actually out of 25 USC  
23 324.

24 So what we're doing here is we're defining  
25 what too numerous means in that statute. So that -- we

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1 would appreciate some ideas on that.

2 MS. LAWSON: Okay. Great. Thank you.

3 MR. SIMPSON: Uh-huh.

4 MS. LAWSON: Then getting back to the, I  
5 believe you called it the jurisdictional clause 169.008, my  
6 first thought was yes, this looks like it's supposed to get  
7 to Straight, but it is confusing and jerrymandered. And I  
8 relish the opportunity to help make it better because I was  
9 really excited when I saw that it was hitting it straight,  
10 and then I was like except there's too many exceptions to  
11 the exception. So thank you for, I guess, affirming my  
12 guess on that one.

13 Okay. Those are the only comments I have.  
14 Thank you.

15 MS. APPEL: Thank you.

16 Do we have any other tribal representatives  
17 present that would like to comment?

18 Then we'll open it up to see if anyone else  
19 has a comment. If anyone has a comment, feel free to come  
20 up to the microphone. And just remember to state your name  
21 and affiliation.

22 Anybody?

23 Shall we take a quick break and let people  
24 digest what they've heard so far? How about if we come back  
25 in ten minutes. It's 2:40 now, so let's reconvene at 2:50.

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1 Thank you, everyone.

2 (Recess was taken at 2:40 p.m.; resumed at  
3 3:00 p.m.)

4 MS. APPEL: Does anyone who hasn't commented  
5 yet want to comment today?

6 Just to reiterate, this is your chance, if  
7 you want to make a comment. If no one would like to  
8 comment, then I think we'll probably wrap up early, so come  
9 on up.

10 MR. SIMPSON: Yes. If you've spoken before  
11 and want to talk again, you're welcome to do that too.

12 MS. ABEITA: We're not trying -- this is our  
13 one chance here to really kind of focus some of this.

14 This is under Section 169.202, and then we're  
15 talking about the renewal of a right-of-way and the issue of  
16 the change in size, type, location, or duration of the  
17 right-of-way. And we've had that issue with fiber optics  
18 where the line has been laid and then the grantee has said  
19 look, we need to come in and we need to fix or improve the  
20 line; however, the line that they are now laying is a much  
21 bigger capacity type fiberoptic line.

22 And so the tribe has said that we think that  
23 this is a change in the size or the scope granted, there's  
24 no change in the actual size of the right-of-way, but there  
25 is a change in the use or the purpose of it. It's allowing

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1 for, I guess, a greater capacity.

2 And so that the tribe has felt that in some  
3 instances there needs to be a new right-of-way. But the  
4 Solicitor's office has rendered an opinion under -- I  
5 forget, the -- there's a policy about, it talks about  
6 improvements in communications or something to that effect,  
7 and that that is covered under, so that any kind of  
8 improvements is covered under that and that the BIA would  
9 not consider that a change in the scope or the type of  
10 right-of-way. And so I'm wondering what the opinion is on  
11 that.

12 MR. SIMPSON: It's a, it's a, what is called  
13 in the Solicitor's office an M opinion. What that means is  
14 it's mandatory on all of the parts of the department.

15 The opinion was issued -- and I could give  
16 you -- I can't give you the cite to it off the top of my  
17 head. I've got it, I've read it, but what it says is that  
18 it's -- actually, it's in the context, originally, of a  
19 federal right-of-way, if I remember right.

20 And I want to say it has to do with Mountain  
21 States Telephone & Telegraph, but I'm not sure about that.  
22 But basically there was a right-of-way at issue there where  
23 the original right-of-way, as with so many of the railroad  
24 ones from the late 19th century, the original right-of-way  
25 allowed for telegraph and telephone lines.

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1                   And the opinion says that -- oh, it has to do  
2 with MCI. That's what it was. It wasn't Mountain States  
3 Telegraph, it was MCI, before they became Verizon or whoever  
4 they are now. And the company wanted to put in fiberoptic  
5 lines because, of course, we don't generally put in  
6 telegraph lines anymore and telephone lines are getting less  
7 and less.

8                   And the solicitor opined that, essentially, a  
9 fiberoptic line now is basically the same thing as a  
10 telephone or telegraph line. And so that would be the same  
11 use that was already allowed in that right-of-way and so  
12 that there would not be a different, a requirement for a new  
13 right-of-way.

14                   MS. ABEITA: Okay. So that's still the  
15 position, then?

16                   MR. SIMPSON: That's what we've opined.  
17 Those opinions, of course, are subject to regulation. So I  
18 hesitate to say this because it's an M opinion, but it's the  
19 truth that we could, in fact, overrule it through  
20 regulations, if we needed to, at least for Indian land.

21                   We'd have to think long and hard about it,  
22 but the possibility is there.

23                   MS. ABEITA: Okay. This goes again to those  
24 long-term, in perpetuity --

25                   MR. SIMPSON: Right.  
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1 MS. ABEITA -- type of right-of-way, but yet  
2 there's this improvement the grantee is allowed to change to  
3 do this but yet they are still relying on that, on the  
4 long-term right-of-way --

5 MR. SIMPSON: Uh-huh.

6 MS. ABEITA: -- and at that point, the tribe  
7 had said well, we think this should actually be subject to a  
8 new right-of-way. So with changing technology, I think  
9 that -- again, while not every right-of-way mentioned is for  
10 commercial use, some of these are --

11 MR. SIMPSON: Sure.

12 MS. ABEITA: -- and so the tribes,  
13 particularly that need to maximize their resources when they  
14 are trying to, again, get adequate compensation for the use  
15 of their resources, this is something that I think needs to  
16 really be considered. And, again, once that long-term  
17 right-of-way is set, it makes it very difficult for the  
18 tribe to come back and adjust. And so, again, you feel like  
19 the tribe has given up an opportunity for adequate  
20 compensation for the use of that land.

21 MR. SIMPSON: Yeah. It's a difficult issue.  
22 We've also had ones where, for instance, there's a rail  
23 line, used to be a commercial freight line, between  
24 Albuquerque and Santa Fe, the BNSF. That rail line is now  
25 the Rail Runner commuter train and which crosses several

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1       pueblos, too, and we had to figure out how that could work.

2               It's a tough analysis, especially as you  
3       pointed out, the technology has changed so much over the  
4       last, you know, 150 years, since these kinds of  
5       rights-of-way were originally granted.

6               MS. ABEITA: Thank you.

7               STEVEN: My name is Steven, and I'd like to  
8       ask just a question that brings to mind is where, for  
9       existing easements, where we now have a regulation that  
10      speaks to an issue on which the prior regulations under  
11      which the easement was granted was silent, where the prior  
12      easement was silent, would it be that the new regulation  
13      would apply? And I think one of the ones that's come up the  
14      most is reassignability.

15              The old regulations were silent on that, most  
16      of our preexisting easements are silent on that; therefore,  
17      they were felt to be assignable without owner consent. I  
18      think one of the commenters brought that up. And so now  
19      we're going to say that all easements, by regulation, are  
20      assignable only with owner consent and BIA approval. So  
21      long as your preexisting easement was silent on the issue,  
22      now further assignments will require consent approval, is  
23      that correct?

24              MR. SIMPSON: I think so. I'm looking for  
25      our effectiveness provision in here. There it is.

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1                   So if we already, if we granted or approved  
2                   the right-of-way before these regulations are effective,  
3                   then this regulation applies to that right-of-way document,  
4                   unless there's a conflict, unless the provisions of the  
5                   right-of-way conflict with this part.

6                   So if the right-of-way is silent on that,  
7                   then there's no provision to conflict and, therefore, this  
8                   part would govern. So, yes, they would need to have consent  
9                   to the assignments.

10                  MS. APPEL: Did that spark any new comments  
11                  from people?

12                  MR. WEBB: The comment that brought that to  
13                  mind was the one about mortgaging because that question has  
14                  come to us. And under the existing regulations, the  
15                  argument was if you can assign without further consent  
16                  approval, you can -- I would assume that you can mortgage  
17                  without consent approval. And that's all going to be  
18                  changed now under the new regulations.

19                  MS. LAWSON: Yes, I would agree. This is  
20                  Sarah Lawson from Muckleshoot again.

21                  MR. SIMPSON: Thank you.

22                  MS. LAWSON: When I heard about the mortgages  
23                  and assignments thing, especially the mortgages part, with  
24                  Puget Sound Energy, I went and looked at the regs and I  
25                  didn't see anything that said anything about it. But now

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1     that we have it in the proposed regs, I went and looked at  
2     the effectiveness subsection to see if it would apply to all  
3     of the mortgages that have been done or all the assignments  
4     that have been done without permission of the landowners or  
5     permission of the tribe. And I was pretty excited that we  
6     can go back and address these piggy-backing and mortgaging  
7     issues, so thank you.

8                     MR. SIMPSON: You're welcome.

9                     MS. APPEL: Do we have any more comments?

10                    MR. SIMPSON: Don't make us start calling out  
11     people.

12                    MS. APPEL: All right. Seeing no, no one  
13     else come up to the microphone, I think that we'll close  
14     this session for today.

15                    We do have a teleconference session tomorrow  
16     that is at 1:00 p.m. Eastern time, so 10:00 a.m. Phoenix  
17     time. If you're interested in calling in, the number and  
18     pass code are in the Federal Register notice that was  
19     included in your handouts.

20                    Thank you, again, to Salt River Pima-Maricopa  
21     for hosting us in this beautiful facility, and I hope that  
22     everyone has a wonderful afternoon.

23                    Thank you.

24                    (3:11 p.m.)

25                             \* \* \* \* \*  
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1 STATE OF ARIZONA. )  
 ) Ss.  
2 COUNTY OF MARICOPA )

3 BE IT KNOWN that the foregoing proceedings  
4 were taken before me, SANDRA L. MUNTER, RPR, a Certified  
5 Reporter, Certificate No. 50348, for the State of Arizona;  
6 that all proceedings were taken down by me in shorthand and  
7 thereafter reduced to print by computer-aided transcription  
8 under my direction; that the foregoing pages are a full,  
9 true, and accurate transcript of all proceedings, all done  
10 to the best of my skill and ability.

11 I FURTHER CERTIFY that I am in no way related  
12 to nor employed by any of the parties hereto, nor am I in  
13 any way interested in the outcome hereof.

14 DATED at Phoenix, Arizona, this 15th day of  
15 August 2014.

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SANDRA L. MUNTER, RPR  
Certified Reporter No. 50348

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